Nos. 76-777, 76-933, 76-934, 76-935

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

PEGGY J. CONNOR, et al., *Appellants*
and
UNITED STATES OF AMERICA, *Intervenor*
v.
CLIFF FINCH, Governor of Mississippi, et al.

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Appellants
v.
PEGGY J. CONNOR, et al., and the
UNITED STATES OF AMERICA, *Appellant*

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v.
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PEGGY J. CONNOR, et al., *Appellants*
v.
CLIFF FINCH, Governor of Mississippi, et al.

On Appeal from the United States District Court for the Southern District of Mississippi (Three-Judge Court)

REPLY BRIEF FOR THE STATE PARTIES

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ARGUMENT

Plaintiffs and intervenor in their opening briefs argue this case in the context of the past. This case is not before this Court with the facts of 1960. It is the political realities of 1977 that this Court must address in directing the fashioning or reviewing of any reapportionment plans.

Moreover, in discussing racial dilution in the permanent court-ordered plan, plaintiffs and intervenor argue that anytime a legislative district could have been drawn so as to *maximize* the opportunity to elect a black legislator, failure to so draw the lines was dilution. In effect, they argue that the district court was under an affirmative duty to racially gerrymander on behalf of black voters in Mississippi. Not only is such racial gerrymandering not mandated by law, equity or the Constitution, it is repugnant to all three.

While both the 1979 permanent court-ordered plan and the 1975 temporary court-ordered plan comply with all constitutional requirements, and neither in any legal, equitable or constitutional sense dilutes the black vote, the 1975 temporary plan is the preferable plan. The 1979 permanent plan fragments county lines and thus impinges on the basic political institution of Mississippi. Such disregard of Mississippi's well-established and rational state policy under the prior decisions of this Court is an abuse of judicial discretion.

I. RACIAL DILUTION IN THE POLITICAL PROCESS DOES NOT EXIST IN MISSISSIPPI.

A. Racial Dilution in Reapportionment Plans

Beginning with consideration of the constitutionality of the State's 1975 legislative reapportionment

plan, racial dilution became a central issue (Supp. App. 75a). Prior to that time, the validity of the reapportionment plans had focused on the one person-one vote issue. The present challenges to the district court's 1975 and 1979 reapportionment plans are framed almost exclusively in terms of racial dilution. Thus, it becomes necessary to define exactly what is racial dilution and the extent, if any, of its existence in Mississippi.

Dilution is where a particular apportionment scheme operates to minimize or cancel out the voting strength of the minority elements. To sustain a claim of racial dilution, "it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential." *White* v. *Regester,* 412 U.S. 755, 765-766 (1973). The group alleging discrimination has the burden of producing evidence, *Id.* at 766, that it has been denied access to the political processes.

Two of the relevant factors in determining access to the political processes include the opportunity to participate in the candidate selection process, *White* v. *Regester, supra,* 412 U.S. at 766, and the responsiveness of the elected representatives to the needs of the minority group, *Zimmer* v. *McKeithen,* 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd on other grounds sub nom., East Carroll Parish School Bd.* v. *Marshall,* 422 U.S. 1055 (1976).

Past discrimination does not prove dilution. For there to be present dilution, it must be proven that there are *continuing effects* of past discrimination that impair the minority group's present ability to participate in the political processes. *Bradas* v. *Rapides*

Parish Police Jury, 508 F.2d 1109, 1112 (5th Cir. 1975); *Turner* v. *McKeithen,* 490 F.2d 191, 194 (5th Cir. 1973).

While giving lip service to the principles of racial dilution enunciated above, plaintiffs and intervenor argue a definition of dilution that has no constitutional basis. Plaintiffs and intervenor begin by finding that whenever "heavy black population concentrations are unnecessarily fragmented and dispersed, or combined with heavier white population concentrations to create districtwide white majorities" there exists unconstitutional racial dilution (Plaintiffs Br. 52; Intervenor Br. 38). Plaintiffs and intervenor cite four cases,[1] none of which support their proposition.

In *Taylor* v. *McKeithen,* 407 U.S. 191 (1972), this Court vacated a court of appeals decision which had modified, in part, a district court adoption of a particular reapportionment plan. The case was remanded to the court of appeals to explain its modification. *Id.* at 193-194. On remand the court of appeals reaffirmed in a lengthy opinion its earlier decision. *Taylor* v. *McKeithen,* 499 F.2d 893 (5th Cir. 1974). At issue in *Taylor* was whether a district court had exceeded the bounds of judicial discretion in adopting a reapportionment plan that created two "safe" black districts.

The four districts approved by the district court, and at issue on appeal, involved a conceded racial gerrymander so as to *guarantee* the election of blacks

[1] *Taylor* v. *McKeithen,* 407 U.S. 191 (1972); *Robinson* v. *Commissioners Court, Anderson County,* 505 F.2d 674 (5th Cir. 1974); *Moore* v. *Leflore County Board of Election Com'rs,* 502 F.2d 621 (5th Cir. 1974); *Howard* v. *Adams County Board of Supervisors,* 453 F.2d 455 (5th Cir. 1972), *cert. denied,* 407 U.S. 925 (1972).

in two of the districts.[2] *Taylor* v. *McKeithen, supra,* 499 F.2d at 902. In the alternative plan rejected by the district court, no "safe" districts were created that would guarantee a black representative.[3] *Ibid.* The alternative plan adhered to the traditional ward boundaries, whereas the plan adopted by the district court fragmented ward lines. *Id.* at 902-903. The district court had concluded that historical boundaries of voting districts in Louisiana had reflected a history of racial discrimination and had been the prime reason why only two blacks had been elected to the state legislature in the last 75 years. *Id.* at 896. The court of appeals found that conclusion erroneous stating that "it was never necessary for the legislature to resort to covert disenfranchisement of blacks by manipulating the boundaries of legislative voting districts" because of the total effectiveness of the overt methods of disenfranchising blacks. *Ibid.*

On remand from this Court, the court of appeals specifically avoided deciding the issue whether "'it is constitutionally permissible to use race explicitly as a criterion in reapportionment, when the goal of racial districting is purportedly benign.'" *Taylor* v. *McKeithen, supra,* 499 F.2d at 910. However, the court of appeals held that the district court's preference for the gerrymandered districts exceeded the bounds of judicial discretion. *Id.* at 911. The court of appeals reinstated its original judgment which approved the alternative reapportionment plan. *Ibid.*

[2] The two "safe" districts contained black population percentages of 70.2% and 64.0%. *Taylor* v. *McKeithen, supra,* 499 F.2d at 901.

[3] The black population percentages in the four districts of the alternative plan were 42.6%, 43.7%, 54.4% and 42.0%. *Ibid.*

In *Robinson* v. *Commissioners Court, Anderson County,* 505 F.2d 674 (5th Cir. 1974), the court of appeals affirmed a district court's decision that a reapportionment plan in Anderson County, Texas was a racially motivated gerrymander designed to dilute the voting strength of the black community. In affirming, the court of appeals stated:

> The district court determined on this record that the County Commissioners' apportionment *was designed precisely to dilute the black vote* and, mindful of the trial court's peculiarly local perspective, we find no reason on this record to reject that conclusion as clearly erroneous. *Id.* at 679 (emphasis supplied; footnote omitted).

In this case, *sub judice* the district court has never found the State Legislature's plans to be racially motivated gerrymanders,[4] nor do the plaintiffs and intervenor prove a racially motivated gerrymander on the part of the district court in the formulation of its reapportionment plans.

In *Moore* v. *Leflore County Board of Election Com'rs,* 361 F. Supp. 603 (N.D. Miss. 1972), *aff'd,* 502

[4] While plaintiffs have at times contended that the State's reapportionment plans were racially motivated gerrymanders (Plaintiffs Br. 72), their contentions have proven baseless. *See, e.g.* the testimony of Dr. Gordon Henderson, a witness on behalf of plaintiffs at the May 7, 1975 hearings regarding the 1975 State legislative plan. At the hearings, on direct examination Dr. Henderson initially testified that the Legislature's plan did not constitute an honest and good-faith effort (App.Vol.II, 53) and was a racial gerrymander (App.Vol.II, 54). On questioning by the court regarding those allegations, Dr. Henderson substantially modified his prior position stating that the gerrymander was resultive, not deliberate (App.Vol.II, 78). He further clarified his allegation of lack of good faith, by stating he was referring to good faith not in terms of motive, but in terms of results (App.Vol.II, 79-80).

F.2d 621 (5th Cir. 1974), the district court found "systematic and *intentional* diluting of black voting strength by gerrymandering" 361 F.Supp. at 607 (emphasis supplied). The drafters of the redistricting plan had admitted fragmenting the concentration of black residents in an attempt to create five districts that reflected for each district the same racial ratio, i.e., 58% black to 42% white, as existed for the county as a whole. *Id.* at 604. The plan failed "to make any effort to correlate road mileage, bridge maintenance, land area, with population or to consider natural boundaries and compactness of each district along with equality of functions on the part of each supervisor and law enforcement personnel. . . . There [was] no evidentiary basis for concluding that Leflore County present[ed] any unique or peculiar problems that preclud[ed] the use of several legitimate planning objectives other than equality of population in developing a meritorious plan." *Id.* at 608-609. In finding the reapportionment plan unconstitutional, the court explicitly stated that it did,

> not place its imprimatur upon concentrating blacks within one or more districts to emphasize their voting strength, but only that the race of people cannot be considered in reapportionment. 'The Federal Constitution is color blind. It is equally as unconstitutional to discriminate against a white man as it is to discriminate against a colored man....' *Id.* at 607.

Thus, the very case upon which plaintiffs rely for the proposition that reapportionment plans must not disturb black concentrations refutes any such deliberate racial considerations in formulating a reapportionment plan.

Intervenor cites *Howard* v. *Adams County Board of Supervisors,* 453 F.2d 455 (5th Cir. 1972), *cert. denied,* 415 U.S. 975 (1974), for the antithesis of what the decision held (Intervenor Br. 38). In *Howard,* the Board of Supervisors of Adams County, Mississippi, adopted a reapportionment plan that achieved the goal of one person-one vote. A second objective that was achieved by the plan was the equalization of the responsibilities of each supervisor in exercising their traditional function of highway and bridge maintenance. This objective necessitated a plan that consolidated urban and rural areas into each district.

> As the new plan was developed, therefore, each district converged in spokelike fashion from a broad rural base into the City of Natchez. This dissection of the population concentration of the county resulted in an equal allocation of the population of Natchez among the new districts. *Id.* at 456.
>
> * * *
>
> The allocation of the population concentration of the city resulted in the removal of some 7000 blacks from old Supervisor District Four, where prior to the implementation of the plan 60% of the blacks in the county lived and commanded a 75% population majority. These blacks, now residing in new districts other than Four, found themselves in electoral districts where blacks no longer represented a majority of the population. The reallocation of the population of Natchez, on the other hand, substantially balanced the racial ratio of the population in new Districts Three, 51% white, 49% black, and One, 55% white, 45% black, and resulted in a significant amelioration of the racial population disparities in the other two districts, although whites there continued to constitute a 60%-40% population majority. *Id.* at 457.

Plaintiffs objected to the plan as a racially motivated gerrymander that unconstitutionally diluted the voting power of blacks. The identical contention argued by plaintiffs in this case was argued in *Howard, supra,* 453 F.2d at 457:

> Specifically, plaintiffs argue that this dilution is represented by the difference in effective voting power blacks now command in Adams County, under the new plan, and the effective voting power blacks could command if the revision had been drawn to recognize their population segment of northwestern Adams County as numerically large enough and geographically contiguous enough, to constitute two electoral districts in which blacks would retain a significant population majority.

The court of appeals affirmed the district court finding that the plaintiffs failed to sustain their burden of showing that the new plan unconstitutionally diluted, minimized, or cancelled the voting strength of the black citizens of Adams County. *Howard, supra,* 453 F.2d at 458. Relying upon this Court's decision in *Whitcomb* v. *Chavis,* 403 U.S. 124 (1971), the court of appeals stated:

> Further, we reject the plaintiffs' notion that they are constitutionally entitled to have old District Four divided into two predominantly black electoral districts simply because they command a population concentration of sufficient size and contiguity to constitute two equally apportioned districts. *Howard, supra,* 453 F.2d at 458.

Plaintiffs and intervenor further argue that the measuring stick for determining dilution is voting age population (VAP), rather than general population (Plaintiffs Br. 56; Intervenor Br. 52). They reason

that since "[o]nly those of voting age can have an effect on the political processes" and that "[s]ince the black proportion of the VAP in Mississippi is less than that of the general population," then voting age population is the determining factor in racial dilution (Intervenor Br. 52).

But, according to the proposition argued by plaintiffs and intervenor, the inquiry into determining dilution does not end with finding a majority black voting age population. Plaintiffs and intervenor theorize that "more than a bare majority of the VAP [voting age population] is necessary to enable Mississippi blacks to elect a candidate of their choice" (Intervenor Br. 53; Plaintiffs Br. 43-44). Intervenor has established 54% black voting age population as the "minimum racial composition needed for blacks to have a working majority in a district" (Intervenor Br. 53, fn. 46).

Finally, plaintiffs and intervenor contend that even where the blacks represented 54% or more of the voting age population, if the district was multi-member there was racial dilution (Plaintiffs Br. 65-66; Intervenor Br. 66-67).

In short, plaintiffs and intervenor are contending that whenever district lines can be drawn to create a district that would guarantee the election of a black legislator—i.e., a "safe district"—failure to so draw district lines is dilution. Plaintiffs and intervenor are not so much concerned with the constitutional principle of one person-one vote as they are with attempting to create districts that will *maximize* the number of black legislators that can be elected. *See,* Intervenor Br. 59. One example is plaintiffs' contention that the district court should have accepted plaintiffs' alternative plan

for Warren County, which would have created a black population majority district, although plaintiffs concede that their plan provides "slightly higher population variances" (Plaintiffs Br. 45). Further evidence of plaintiffs' and intervenor's attempt to maximize the number of black legislators elected without any real concern for remedying an unconstitutional dilution is their argument for special elections. Their argument boils down to the desire to hold special elections wherever there is a greater chance under the permanent plan than the temporary plan to elect a black legislator (*See,* Plaintiffs Br. 68; Intervenor Br. 33).

B. Mississippi and the Absence of Dilution

1. *Absence of Lingering Effects*

The district court specifically found that plaintiffs failed to demonstrate any present impact from past discrimination. *Connor* v. *Waller,* 396 F.Supp. 1308, 1325 (S.D. Miss. 1975) (App. Vol. III, 225). Moreover the district court significantly determined that:

> The Voting Rights Act of 1965 has effectively reduced all such racially discriminatory factors to what may be termed an irreducible minimum (App. Vol. III, 226).

Plaintiffs and intervenor predicate their case on a history of the past (Plaintiffs Br. 35; Intervenor Br. 42) —a history that is a remote history. However, the significance of the past in dilution cases lies in how it bears on political participation today. *McGill* v. *Gadsen County Commission,* 535 F.2d 277 (5th Cir. 1976); *Paige* v. *Gray,* 538 F.2d 1108 (5th Cir. 1976).

This Court in *Whitcomb* v. *Chavis,* 403 U.S. 124, enunciated the criteria evidencing invidious discrimination in the political processes:

> We have discovered nothing in the record or in the court's findings indicating that poor Negroes were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen. Nor did the evidence purport to show or the court find that inhabitants of the ghetto were regularly excluded from the slates of both major parties, thus denying them the chance of occupying legislative seats. 403 U.S. at 149-150.

Similarly, the voluminous record in this case is noticeably lacking of evidence of invidious discrimination. Dr. Gordon G. Henderson, testifying on behalf of plaintiffs, admitted that he knew of no blacks in Mississippi having any difficulty in voting within the last five years (hearing of May 7, 1965, App. Vol. II, 73); nor did he know of instances where race prevented an individual from qualifying as a candidate for a desired office, participating in the candidate election process or any other portion of the political process (*Id.,* App. Vol. II, 73-74).

Reverend Rims Barber, Associate Director of the Delta Ministry, an organization "to assist persons and groups of people who are oppressed by poverty or by discrimination in the State of Mississippi" (hearing of May 7, 1975, App. Vol. II, 81-82) also testified on behalf of plaintiffs. Reverend Barber testified that from "65 to 70 percent of voting age eligible blacks . . . are registered" (App. Vol. II, 84-85) and that "[t]he turnouts range from 60 percent to 70 percent for blacks

on an average statewide and from around 75 to 80 percent for whites in an election of the magnitude of the '71 gubernatorial election" (*Id.* App. Vol. II, 86).

Plaintiffs and intervenor argue that these black voter registration and turnout figures demonstrate lingering effects of past discrimination (Plaintiffs Br. 55; Intervenor Br. 42). However, the 65-70 percent black voter registration in Mississippi exceeds the national and regional averages. Only 55 percent of the voting age eligible blacks in the nation are registered to vote (54 percent are registered in the North and West and 55 percent in the South).[5] Likewise, the 60 percent to 70 percent turnout rate for blacks in Mississippi exceeds the national and regional averages (i.e. 34 percent for the nation, 38 percent for the North and West and 30 percent for the South).[6]

The district court's findings on present day political participation by blacks cannot be overemphasized:

> We have no difficulty in holding that at the present day interference with the right of black citizens to cast their ballots is a myth. (App. Vol. III, 225-226)

Another United States District Judge for the Southern District of Mississippi reached substantially the same conclusion when reviewing the same "evidence" presented in *Kirksey* v. *Board of Supervisors of*

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[5] Joint Center for Political Studies, NATIONAL ROSTER OF BLACK ELECTED OFFICIALS, Vol. 6, p. xiv (August, 1976).

[6] *Ibid.*

Hinds County, Mississippi, 402 F.Supp. 658 (S.D. Miss 1975):[7]

> There is absolutely no evidence in this record that any person has been denied the right to register or to vote because of his race since the enactment of the Voting Rights Act of 1965. 402 F.Supp. at 672.

Such a finding is supported by plaintiffs' own witnesses. Reverend Rims Barber testified that "technical bars to political participation are 99 percent down" (hearing of May 7, 1975, App. Vol. II, 100). Like Dr. Henderson, he had not observed in the last five to six years anyone being denied the right to register on account of race (*Id.* App. Vol. II, 107).

Further, Mr. Henry J. Kirksey, one of the lead plaintiffs in this case and the *Kirksey* board of supervisors redistricting case, also testified at the May 7, 1975 hearing (hearing of May 7, 1975, App. Vol. II, 114). Mr. Kirksey testified that he had voted in nearly every election in Hinds County since 1961 and had encountered no problems in participating in the political processes (*Id.* App. Vol. II, 124-125). Additionally, Mr. Kirksey, who was a black candidate for state senator for Hinds County in 1971, testified that he garnered 10,000 votes on a campaign expenditure of only $85.00, which amount he received two days prior to the election. (*Id.* App. Vol. II, 117).

Plaintiffs and intervenor attempt to litigate a 1976 case in a 1960 atmosphere, and in so doing they attempt

[7] Plaintiffs incorporated into this case the record in *Kirksey* v. *Board of Supervisors of Hinds County, Mississippi,* 402 F.Supp. 658, *aff'd* 528 F.2d 536 (5th Cir. 1976) (awaiting decision on rehearing *en banc*) (Plaintiffs Br. 39, fn. 67).

to give a distorted view of the present situation. Black citizens today enjoy full and equal access to the political processes of the State and are effectively participating in the political processes electing candidates of their choice, both black and white. Plaintiffs' witnesses were unable to satisfactorily explain why white candidates in several races received an overwhelming majority of the votes in predominantly black districts (App. Vol. II, 55-74).[8] Neither could plaintiffs' witnesses satisfactorily explain why black candidates were elected in areas where they were not in the majority (App. Vol. II, 102).[9]

The finding of the district court in the case *sub judice* that blacks in Mississippi enjoy full participation in the political processes is mirrored in *Kirksey* v. *Board of Supervisors of Hinds County, supra,* 402 F.Supp. 658. This decision involved the redistricting of Hinds County, Mississippi—the State's largest county—and was affirmed by the Court of Appeals for the Fifth Circuit. It is presently pending, awaiting decision after rehearing *en banc.* United States District Court Judge Walter L. Nixon, Jr., in reviewing the same evidence presented to the lower court in the case *sub judice,* made the following extensive findings:

> One fact which this Court deems significant however, in again reviewing this evidence, is that the vast majority of what this Court considers the

[8] *See also,* Intervenor Br. 44, fn. 49, where intervenor notes that a black candidate ran and lost in House District 28, which is 61.1% black voting age population.

[9] Reverend Rims Barber testifying for plaintiffs at the May 7, 1975 hearing stated that in one significant instance a black candidate won by a majority vote in an area where blacks constituted only 10-15 percent of the total population (App. Vol. II, 102).

more severe allegations of racial discrimination occurred a number of years ago. 402 F.Supp. at 671.

* * *

There is absolutely no evidence in this record that any person has been denied the right to register or to vote because of his race since the enactment of the Voting Rights Act of 1965.

* * *

The school system of Hinds County and the City of Jackson have been operating under Court order since the mid-1960's and the effects of the operation of a dual school system in Hinds County prior to that time have long since diminished or disappeared.

* * *

Subsequent to [*Love* v. *McGee*],[10] however, we do not find any actions or non-actions on the part of white elected officials evidencing racial discrimination or a lack of responsiveness on their part to the economic, social or political interest of the black community.

* * *

On the contrary, this Court has witnessed over the past seven years a willingness on the part of Hinds County officials to seek equitable solutions to racial problems. 402 F.Supp. at 672.

In affirming the *Kirksey* county redistricting decision, the Court of Appeals for the Fifth Circuit significantly pointed out, "The [District] Court's findings of fact are extensive and are in the main not disputed by plaintiffs." 528 F.2d 536, 537-538. Further, the Fifth Circuit noted at footnote 6:

> Plaintiffs' factual attack is limited mainly if not entirely, to one on ultimate facts or legal conclusions of the district court. 528 F.2d at 538.

[10] 297 F. Supp. 1314 (S.D. Miss. 1968).

Finding the political processes completely open, the district court in *Kirksey* v. *Board of Supervisors of Hinds County, supra,* 402 F.Supp. at 672, concluded:

> This Court does not find that any of the electoral laws presently in effect in Hinds County or this State operate to make it more difficult for blacks to equally participate in the electoral process.

The district court's finding in *Kirksey, supra,* are reflected in the findings of the case *sub judice* and aptly place this case in its proper context:

> There is a point in time when past instances or examples of racial discrimination become remote —a time when a past history becomes a remote history. That time has arrived for Hinds County. The mistakes of the early 1960's and prior to that time do not in this Court's opinion have any significant effect on the nomination and election of Hinds County officials in 1975. 402 F.Supp. at 673.

Perhaps the most telling examples of the absence of lingering effects of the past are revealed by the Federal Observers Report filed with the district court January 26, 1976 (Submission of the United States Pursuant to October 24, 1975 Court Order) (App. Vol. I, 28). This report contained all election irregularities observed by federal officials dispatched to Mississippi for the 1975 quadrennial elections. The district court described the contents of the report:

> We requested a detailed report from the Attorney General as to any observed interference with the right of black citizens to participate in the 1975 elections. Nothing was reported beyond some disputes as to whether an individual was registered to vote in the precinct where he was offering to vote, whether he was registered at all, and such

like. We observe that the Department of Justice has initiated no prosecutions for alleged violations of federally guaranteed voting rights in 1975 (App. Vol. II, 225).

Further, the district court observed that no instances of interference with the right to vote in Mississppi were reported by federal officials dispatched to observe the 1976 Presidential and Congressional elections (App. Vol. III, 225). Significantly, the district court observed, "the press has uniformly reported that an unusually heavy turn-out of black voters produced the Presidential victory in Mississippi" (App. Vol. III, 225).

Clearly, the record is devoid of any evidence that blacks in Mississippi encounter any difficulty in participating in the political processes at all levels, plaintiffs' and intervenor's speculations and conjectures notwithstanding.

2. *The Mississippi Legislature Has Been and Is Responsive to the Needs of All Citizens of the State, Be They Black or White*

The district court determined that plaintiffs had failed to demonstrate that legislators were unresponsive to the needs of the black citizens of the State. *Connor* v. *Waller, supra,* 396 F.Supp. at 1325. In fact, the record demonstrates affirmatively that the legislature has been and is responsive to the needs of the black citizens of the State (e.g. funding such programs as free public education, welfare, health, adult education, vocational education—Supp. App. 108a) and the district court so found (App. Vol. III, 225). Under the 1975 court-ordered plan 30 representatives and 14 senators were elected from districts having black population majority. Additionally, 46 representatives and 13 senators were elected in 1975 from districts having black population percentages from between 36-50 percent. It would be most unrealistic to conclude that legislators at least from these areas would not be responsive to the black interests. In *McGill* v. *Gadsen County Commission, supra,* 535 F.2d 277, the court of appeals for the Fifth Circuit upheld an at-large voting scheme in Gadsen County, Florida where 49.36 percent of the voters were black. In addressing the issue of responsiveness of elected officials, the court of appeals concluded: "indeed, given the significant number [of blacks] in the County, an elected official (whether black or white) would have to be responsive to black interests in order to be reelected." *Id.* at 281.

3. *History of Multi-member Districts and Apportionment in Mississippi*

Plaintiffs and intervenor contend that multi-member districts in Mississippi have been utilized to dilute the effectiveness of the voting strength of blacks in Mississippi. Citing historical treatises, plaintiffs attempt to show that multi-member districts historically were utilized to disfranchise blacks in Mississippi (Plaintiffs Br. 30-31). The district court found otherwise (App. Vol. II, 187). The "use of multi-member and multi-county districts in Mississippi does not have its origin in a desire to cancel out or minimize black voting strength." *Connor* v. *Waller, supra,* 396 F.Supp. at 1323. An act of the Congress of the United States, passed March 1, 1817, provided for 48 delegates to the Constitutional Convention, called to establish the new state of Mississippi. These delegates were all to be elected from multi-member districts (14 counties electing from 2 to 8 delegates) (App. Vol. II, 187).

As the district court articulated, "the Mississippi Legislative Apportionment Act of May 12, 1837, at a time, unhappily, when black people were held in slavery and could not vote, set up 24 multi-member districts for the election of Representatives" electing 2 to 4 members per district (App. Vol. II, 187). By 1846, the State had 22 multi-member districts electing 2 to 4 representatives. Eighteen of the senate districts were composed of the combination of 2 to 4 counties. *Hutchinson's Mississippi Code of 1848,* 377-378.

The Mississippi Constitutional Convention of 1868 "overwhelmingly controlled by the newly liberated slaves and their friends, most of them recent arrivals in Mississippi" (App. Vol. II, 187), apportioned legislative districts so that 29 counties elected 2 to 5 representatives each, from multi-member districts. Twenty-three of the 29 senate districts were comprised of 2 to 6 counties. Art. XI, Miss. Const. of 1869, Revised Code of 1871, 665.

Under the Constitution of 1890, multi-member districts were included for both the Houses and the Senate. Miss. Const. §§ 254, 255. Legislative reapportionment under the Constitution of 1890 remained in effect until 1962 when the Mississippi Constitution was amended in the wake of *Baker* v. *Carr,* 369 U.S. 186 (1962) (App. Vol. II, 188).[11]

Plaintiffs and intervenor erroneously contend that the Mississippi Constitutional Convention of 1890 deliberately gerrymandered the State's legislative districts in an effort to disfranchise blacks (Plaintiffs Br. 31-32; Intervenor Br. 8); citing in support, Kirwan, REVOLT OF THE REDNECKS and Kirwan, *Apportionment in the Mississippi Constitution of 1890,* 14 J. SOUTHERN HIST. 234 (1948). However, as Kirwan points out, under the 1890 apportioning:

> . . . if all made adults in every legislative district in Mississippi had voted, and if they had divided on race lines, Negroes would have returned 69 representatives and white 64.[12]

Likewise, under the 1890 apportioning provisions:

> In 1900, according to census figures, such a hypothetical vote would have returned the same number of whites and negroes as in 1890, and in 1910 there would have been 71 Negroes and 66 whites. Not until 1920 would shifts of population and creation of new counties have given the whites a majority of the legislators.[13]

Therefore, Kirwan undermines rather than underpins plaintiffs' and intervenor's contention.

The record in this case places beyond cavil that the court-structured 1975 reapportionment plan, although containing some small multi-member districts, was void of any racial dilutive effect upon the black vote in Mississippi.[14]

II. A COURT IN EXERCISING ITS REMEDIAL POWERS IS NOT REQUIRED NOR PERMITTED TO RACIALLY GERRYMANDER

A. Racial Gerrymandering for Any Purpose is Unconstitutional

The foundation of plaintiffs' and intervenor's challenge to the district court's 1975 and 1979 plans is

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[11] The subsequent reapportionment acts of the Mississippi Legislature were invalidated by the district court for containing excessive variances, and were not invalidated for any racial dilutive reasons.

[12] A. D. Kirwan, REVOLT OF THE REDNECKS, Ch. 7, p. 83 (1965).

[13] *Ibid.*

[14] The same is true of the 1979 district court plan.

premised on a single contention: the district court was under an affirmative duty to formulate a reapportionment plan that would guarantee the election of the maximum number of black legislators. Plaintiffs and intervenor seek nothing less than a racial gerrymander.[15] The question becomes: Is a racial gerrymander any less invidious when its purpose is to give a minority a proportion of the legislative representation?[16]

"This Court has, of course, rejected the proposition that members of a minority group have a federal right to be represented in legislative bodies in proportion to their number in the general population." *Beer* v. *United States,* 425 U.S. 130, 136, fn. 8 (1976). *Accord, Whitcomb* v. *Chavis,* supra, 403 U.S. at 149.

Justice Douglas in a dissent in *Wright* v. *Rockefeller*, 376 U.S. 52 (1964), discussed whether racial gerrymandering is permissible when the goal is to guarantee a minority representation. In *Wright,* the

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[15] Plaintiffs assert "color-conscious relief is necessary in redistricting cases because without a thorough understanding of the existence and location of minority voting strength, the trial court might well devise a remedy which would, in the words of the Fifth Circuit, 'accomplish the same dilution as the original invalid apportionment'" (Plaintiffs Br. 55). *See also,* Intervenor Br. at 54, 55. "Since racial discrimination is being remedied, the district court should have taken account of racial factors in the formulation of effective relief."

[16] "In shaping a remedy, such a proportional comparison provides a helpful 'starting point' . . . by providing a ready measurement of dilution, as well as a means of assuring that majority voting rights are not infringed" (Intervenor Br. 57). While plaintiffs expressly state that "blacks [are not] constitutionally entitled to a percentage of the population or vote in any particular district" (Plaintiff Br. 56), proportional representation is precisely what plaintiffs seek.

New York State Legislature enacted a statute which, in part, created four congressional districts in New York City. District lines were drawn so as to create one district that was predominantly white and one district that was predominantly black. White voters challenged the reapportionment as violating the Fourteenth and Fifteenth Amendments. Adam Clayton Powell, a black congressman from the predominantly black district, and several other New York County political leaders intervened on behalf of defendants. A three-judge federal district court dismissed the complaint for plaintiffs' failure to prove the reapportionment plan was motivated by racial consideration or was drawn on racial lines. *Id.* at 55. This Court affirmed, two Justices dissenting, upholding the district court's finding that the plaintiffs failed to sustain their burden of proof in showing that the reapportionment "was the product of a state contrivance to segregate on the basis of race or place of origin." 376 U.S. at 58.

Justice Douglas dissented on the ground that the evidence established a prima facie case of a legislative purpose to design the districts on racial grounds. *Wright* v. *Rockefeller, supra,* 376 U.S. at 61. Justice Douglas rejecting any racially motivated apportionment plans wrote:

> The intervenors are persons who apparently have a vested interest in control of the segregated Eighteenth District. They and the State seem to support this segregation not on the 'separate but equal' theory of *Plessy* v. *Ferguson* [163 U.S. 537 (1896)], but on another theory. This theory might be called the theory of 'separate but better off'—a theory that has been used before.
>
> * * *

> The fact that Negro political leaders find advantage in this nearly solid Negro and Puerto Rican district is irrelevant to our problem. Rotten boroughs were long a curse of democratic processes. Racial boroughs are also at war with democratic standards. 376 U.S. at 62 (footnote omitted).
>
> What we have in the Seventeenth and Eighteenth Districts in Manhatten is comparable to the Electoral Register System which Britain introduced to India. That system gave a separate constituency to Sikhs, Muslims, Anglo-Indians, Europeans, and Indian Christians. 376 U.S. at 63 (footnote omitted).

A report published in 1918 in defense of that system in India sounds strikingly familiar to the arguments set forth by plaintiffs. The report stated:

> Some persons hold that for a people, such as they deem those of India to be, so divided by race, religion and caste as to be unable to consider the interests of any but their own section, a system of communal electorates and class representation is not merely inevitable but is actually best. They maintain that it evokes and applies the principle of democracy over the widest range over which it is actually alive at all, by appealing to the instincts which are strongest; and that we must hope to develop the finer, which are also at present the weaker instincts by using the forces that really count. According to this theory communal representation is an inevitable and even a healthy stage in the development of a non-political people. 376 U.S. at 64.

Justice Douglas in concluding that such a system in the United States is unconstitutional, stated:

> Racial electoral registers, like religious ones, have no place in a society that honors the Lincoln tradition—of the people, by the people, for the people. Here the individual is important, not his race, his creed, or his color. The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on. Cf. *Gray* v. *Sanders,* 372 U.S. 368, 379 (1963). The racial electoral register system weighs votes along one racial line more heavily than it does other votes. That system, by whatever name it is called, is a divisive force in a community, emphasizing differences between candidates and votes that are irrelevant in the constitutional sense. *Of course race, like religion, plays an important role in the choices which individual voters make from among various candidates. But government has no business designing electoral districts along racial or religious lines.* 376 U.S. at 66 (emphasis supplied; footnote omitted).
>
> * * *
>
> When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here.
>
> Separate but equal and separate but better off have no more place in voting districts than they have in schools, parks, railroad terminals, or any other facility serving the public. 376 U.S. at 67.

Racial gerrymandering offends the Constitution equally whether it is used to guarantee or deny a racial group an individual representative. If the Equal Protection Clause of the Fourteenth Amendment allows

gerrymandering on behalf of a racial group, then arguably it permits similar gerrymandering on behalf of religious, ethnic, or some other identifiable group. Such intentional gerrymandering has never been sanctioned by this Court.[17] Justice Stevens dissenting in *Cousins* v. *City Council of Chicago,* 466 F.2d 830 (7th Cir. 1972), *cert. denied* 409 U.S. 893, stated:

> A constitutional requirement of proportional representation for all minority groups would not only be unworkable, but also undemocratic. The difficulty inherent in any attempt to define a group's entitlement to proportional representation would frustrate the formulation of the plan. But even if the groups could be categorized, the reasons why such voter classifications should be abjured in a democracy have been eloquently identified by Mr. Justice Douglas's description of certain electoral register systems. See 376 U.S. at 63-67. At the very least, it is doubtful that the Fourteenth Amendment would permit proportional representation of ethnic groups; it is certain, however, that it does not *require* such a result. 466 F.2d at 858 (emphasis in original, footnotes omitted).

Defendants contend that not only does the Fourteenth Amendment not *require* racial gerrymandering, but it does not *permit* racial gerrymandering under any circumstances. If blacks are *entitled* to proportional black representation, then likewise so are Jews,

[17] This Court affirmed without opinion in *Ferrell* v. *Hall,* 406 U.S. 939 (1972) a district court holding that the Oklahoma State Legislature was not required to gerrymander so as to create a legislative district in which blacks were in the clear majority. *Ferrell* v. *State of Oklahoma Ex. Rel. Hall,* 339 F.Supp. 73 (W.D. Okla. 1972). The district court held that, "[s]uch a color conscious approach to apportionment is but another form of racial segregation and is constitutionally impermissible." *Id.* at 83.

Catholics, Irish, Poles, Mexican-Americans, and numerous other distinct groups in the United States. The non-distinct group in any such gerrymandered district is in effect left without representation. In a country that has long prided itself as the "melting pot" of the world, such affirmative segregative action is impermissible.[18] Racial gerrymandering is thus under any circumstances unconstitutional.

B. Permissible Boundaries in Formulating a Court-Ordered Plan

Plaintiffs and intervenor contend that the district court in formulating a legislative reapportionment plan is prohibited from utilizing multi-member districts (Plaintiffs Br. 52; Intervenor Br. 28). As discussed more fully in defendant's opening brief (Defendants Br. 35-47), multi-member districts are permissible in a court-ordered plan. Where, as in Mississippi, a state has an established policy[19] of using multi-member districts, this Court has upheld reapportionment plans that contained multi-member districts. *See, Mahan* v. *Howell,* 410 U.S. 315 (1973); *Burns* v. *Richardson,* 384 U.S. 73 (1966). Multi-member districts have been subject to challenge where *large* multi-member districts were fashioned in court-ordered reapportionment plans,[20] where a court cre-

[18] "The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized." *DeFunis* v. *Odegaard,* 416 U.S. 312 (1974), Justice Douglas dissent at 342. *Accord, Hughes* v. *Superior Court of California,* 339 U.S. 460, 464 (1950).

[19] In Mississippi, multi-member districts have been used to sustain the State's 150-year policy of preserving the integrity of county boundaries.

[20] The *Connor* decisions—*Connor* v. *Johnson,* 402 U.S. 690 (1971); *Connor* v. *Williams,* 404 U.S. 549 (1972); and *Connor* v. *Waller,*

ated multi-member districts in the absence of a state policy preferring multi-member districts,[21] and where multi-member districts were designed or operated to minimize or cancel out the voting strength of racial or political elements of the voting population.[22]

Plaintiffs and intervenor allege that multi-member districts have operated in Mississippi to minimize the voting strength of blacks (Plaintiffs Br. 13; Intervenor Br. 36-37). The basis for this allegation is that blacks have not been elected in the State legislature in proportion to their makeup of the general population of Mississippi. But, as this Court has observed,

> . . . there must be more evidence than a simple disproportionality between the voting potential and the legislative seats won by a racial or political group. There must be evidence that the group has been denied access to the political process equal to the access of other groups. *Chapman* v. *Meier, supra,* 420 U.S. at 17.

Plaintiffs have failed to carry their burden of proof, *White* v. *Regester, supra,* 412 U.S. at 766, and demonstrate that they are presently denied access to the political processes.[23] Thus, the use in Mississippi of small multi-member districts is constitutionally proper.

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421 U.S. 656 (1975)—expressed disapproval of the large multi-member districts that existed in Hinds, Harrison and Jackson Counties. Multi-member districts existed in those counties electing five to twelve at-large representatives. *See,* Defendants Br. 36-42.

[21] *See, Chapman* v. *Meier,* 420 U.S. 1 (1975).

[22] *See, White* v. *Regester,* 412 U.S. 755 (1973).

[23] *See, supra,* pp. 11-19, for a discussion of the evidence regarding plaintiffs' access to the political processes.

Plaintiffs allege that the district court's 1979 plan for senate districts is unconstitutional for containing "excessively high variances" (Plaintiffs Br. 48). Plaintiffs contend that the court plan with a total variance of 16.5% is prima facie unconstitutional, and that therefore the district court should have accepted plaintiffs' Modified Henderson Plan—presented to the district court on October 8, 1976 (App.Vol.III, 182)—with a total variance of 13.66% (Plaintiffs Br. 50).[24] Plaintiffs object to Districts 32, 33, 34 and 35 as being malapportioned.[25] Those districts have a total variance of 11.6% (App.Vol.III, 122), although plaintiffs disagree with the court's calculations of the variances (Plaintiffs Br. 44). Plaintiffs do not object to any other house districts as being excessively malapportioned, although by the court's calculations there remains under the house plan a total variance of 19.3% (Districts 5 and 47, App.Vol.III, 119, 124) and by plaintiffs' calculations there remains a total variance of 27.4% (Districts 24 and 45, App.Vol.III, 253), again evidencing that plaintiffs' sole concern in this case is obtaining the maximum number of gerrymandered "safe" black districts.

In *Chapman* v. *Meier, supra,* 420 U.S. at 22, this Court stated that:

> Although each case must be evaluated on its own facts, and a particular population deviation from the ideal may be permissible in some cases but

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[24] The correctness of plaintiffs' calculations as to the variances in its Modified Henderson Plan is questionable since it is based on plaintiffs' estimates of precinct and beat populations. *See,* App. Vol. III, 264-265.

[25] Plaintiffs also object to House Districts 47, 53, 54, 55, 56, 88 and 89, but those objections are based on the alleged fractionalization of black population concentrations.

not in others, *Swann* v. *Adams,* 385 U.S. 440, 445 (1967), certain guidelines have been developed for determining compliance with the basic goal of one person-one vote.

This Court held in *Mahan* v. *Howell, supra,* 410 U.S. at 324-325, that state legislative reapportionment plans are not to be judged by the more stringent standards applicable to congressional reapportionment plans. Minor population deviations in state legislative reapportionment plans do not establish a prima facie constitutional violation. *See, Gaffney* v. *Cummings,* 412 U.S. 735 (1973) where a variance of 7.83% and *White* v. *Regester, supra,* 412 U.S. 755, where a variance of 9.9% were held not to establish prima facie constitutional violations. As variances grow larger, justifications based on legitimate considerations incident to the effectuation of a rational state policy may be required to sustain the validity of a reapportionment plan. *White* v. *Regester, supra,* 412 U.S. at 764.

The justification asserted by the district court for the variances was its desire to preserve the integrity of county boundaries (App.Vol.III, 118).[26] To have obtained smaller variances, the district court would have had to create a "labyrinthian mishmash of legislative districts, composed of hundreds of Balkanized areas scattered profusely throughout the State" (App. Vol.III, 99). Mississippi's 150-year-old policy of preserving the integrity of county boundaries was discussed in defendants' opening brief (Defendants Br. 33-35).

[26] In fact, the basis, in part, for defendants' appeal was the failure of the district court to have preserved the integrity of county boundaries *in toto.* The variances that appear in the 1975 court plan are the result of preserving the integrity of county boundaries.

Plaintiffs seek to impugn the state policy of preserving the integrity of county boundaries, arguing that counties have been *subdivided* and that multi-county single-member, multi-member, and floterial districts have been created by *combining* counties (Plaintiffs Br. 49). Plaintiffs confuse subdividing and combining counties with the *fracturing* of county boundaries. In fact, at the May 7, 1975 hearings, plaintiffs' attorney reluctantly conceded that they had been unable to find any instances in the history of Mississippi legislative districting where county lines were fractured (Supp.App. 41a). The policy of preserving the integrity of county boundaries has been held by this Court to be a rational one justifying population variances. *Mahan* v. *Howell, supra,* 410 U.S. at 329; *Abate* v. *Mundt,* 403 U.S. 182 (1971); *Reynolds* v. *Sims,* 377 U.S. 533 (1964). Conversely, defendants contend that the infirmity in the district court's permanent plan arises not from having failed to obtain smaller variances, but rather from the failure of the plan to adhere *in toto* to the State policy of preserving the integrity of county boundaries.

C. Evaluation of the Plans

Plaintiffs and intervenor proffered in 1975 three sets of permanent plans—the Valinsky, Kirksey and State Modified Plans.[27] These plans admittedly achieved a *de minimis* population deviation but were properly rejected by the district court. One reason given by the court for such rejection was that they were based on census enumeration districts which did not coincide

[27] Valinsky Plan (App. Vol. I, 325, 346); Kirksey Plan (App. Vol. I, 410, 419); State Modified Plan (App. Vol. II, 139). Plaintiffs and intervenor do not advocate before this Court these plans.

with voting precincts or beats (App. Vol. II, 193, 211). Further, these plans resulted in massive fractionalization of the counties and beats of the State. In rejecting these plans, the district court explained that elections in Mississippi have to be conducted by precinct, beat and county "else the entire procedure would be reduced to inoperable confusion" (App. Vol. II, 194). Mississippi maintains a system of permanent registration (App. Vol. II, 192). At long intervals boards of supervisors in the 82 counties sometimes order a complete new registration of voters to update the poll books. "The record shows instances in which [the Attorney General of the United States] has objected to such re-registrations because it would put the black voters to the inconvenience of registering again and might thus diminish the black vote" (App. Vol. II, 192). Further, since 1817, the counties have been divided into beats with several officials being elected from such beats individually. Voting precincts must be established within and coextensive with these 5 beats; otherwise, there would be no way of electing locally chosen officials (App. Vol. II, 192). The district court concluded that unless elections in this State were conducted by precinct, beat and county, it would be impossible to confine voter registration records to those entitled to vote for supervisor, school board member, justice of the peace, or constable in any particular beat, and it would be impossible to confine the vote on those officials to the beats they are being elected to serve (App. Vol. III, 193).

"The result is that a voting precinct must be wholly within the same Beat; precincts simply cannot straddle Beat lines" (App. Vol. II, 193). The problem presented by plaintiffs' and intervenor's plans is that they

are based on census enumeration districts which do not coincide with voting precincts (App. Vol. II, 194).

While the alternative plans submitted by plaintiffs and intervenor are unworkable, additionally they are unconstitutional as racial gerrymanders. The Valinsky Plan created 23 black voting age majority House Districts, and 7 black voting age majority Senate Districts. The Kirksey plan established 26 House Districts and 7 Senate Districts with black voting age population majorities (App. Vol. II, 244). The United States' State Modified Plan established 29 House Districts and 12 Senate Districts with black voting age population majorities (App. Vol. III, 15, 19).

Reviewing plaintiffs' and intervenor's plans, the district court concluded:

> Moreover, to a large extent we must say in kindly candor that the objective of these plans quite clearly is to *maximize* black voting strength wherever it may be found. These plans would fragment the eighty-two counties into several hundreds of small pieces tacked together in a fashion designed, wherever possible, to establish election districts with black majorities (App. Vol. II, 211) (Emphasis in original).

After the formulation of the 1975 court-ordered plan which eliminated all large multi-member districts, intervenor filed two sets of plans in response to the district court order of 1975 (App. Vol. III, 1-77). Intervenor contended that its Senate and House County Boundary Plans would not be in compliance with requirements of the Fifteenth Amendment of the United States Constitution (App. Vol. III, 13). Intervenor likewise did not urge the adoption of its Senate Restricted Fractionalized Plan stating that,

"it is not an acceptable alternative to the three plans now before this Court, and accordingly we advocate adoption of the Kirksey, Valinsky or State Modified Plan" (App. Vol. III, 23). Intervenor did, however, view its own House Restricted Fractionalized Plan (HRFP) as an acceptable alternative despite this plan containing 7 multi-member districts, 5 of which elected 2 representatives and 2 of which elected 3 representatives (App. Vol. III, 19). The HRFP plan created 27 black voting age majority districts electing 28 members (App. Vol. III, 19).

The plaintiffs filed on October 16, 1975, pursuant to the district court's order of July 11, 1975, additional plans for the permanent reapportionment of the Mississippi Legislature.[28] Plaintiffs did not advocate their County Boundary Plan since in their view "it would [be] inappropriate and unconstitutional for this Court to order these plans into effect in their present form, without change".[29]

In the district court's supplemental order of August 1, 1975, (App. Vol. II, 256), it instructed that the proposed permanent reapportionment plans be based officially on 1973 U. S. Census estimates. U. S. BUREAU OF THE CENSUS CURRENT POPULATION REPORTS: POPULATION ESTIMATES AND PROJECTIONS, "1973 Population and 1972 Per Capita Income Estimates for Counties and Incorporated Places in Mississippi", Series P25, No. 569 (June 1975). However, plaintiffs motioned the district court to modify its order of August 1, 1975, since the 1973 census data gave population statistics

[28] Plaintiffs' Submission of Permanent Legislative Reapportionment Plans, October 15, 1975 (App. Vol. I, 28).

[29] *Ibid.*

for only counties and incorporated places. The district court granted plaintiffs' motion (hearing of June 15, 1976).

On October 9, 1975, defendants filed with the district court their submission pursuant to order proposing that the district court utilize the 1975 legislative plan or in the alternative the 1975 court order plan (Supp. App. 89a).

After the formulation by the district court of its permanent reapportionment plans, plaintiffs sought to relitigate this case by offering still another plan for the Senate (referred to as the Modified Henderson Plan) as well as several alternative proposals for numerous House Districts (App. Vol. III, 160, 182). These alternatives are based on "ex parte" population estimates, which estimates were made by superimposing census enumeration districts over voting precincts which are not co-terminous (App. Vol. III, 252). The reliability of these estimates were never accepted by the district court, nor were they accepted by the Special Master (App. Vol. III, 263, 265, 267, 269, 271, 272).

Plaintiffs challenge the district court's senate plan contending it was based on 1975 election data and not 1970 census data (Plaintiffs Br. 4, 21). This is incorrect. Plaintiffs neglected to state that the Special Master did utilize 1970 U. S. Census data. The Special Master only used 1975 precinct election data in limited circumstances when necessary to determine precinct population, and even then such data was utilized in connection with known 1970 Census data for larger political subdivisions (App. Vol. III, 261-2). Of all the plans advocated by the parties, only the 1975 court plan is not based on population estimates.

III. REQUEST FOR SPECIAL ELECTIONS

Plaintiffs seek special elections in all majority black legislative districts contained in the district court's 1979 plan, except for House Districts 48, 49, 57, 64, 65 and 67 to be held as soon as practicable (Plaintiffs Br. 76). As plaintiffs state, "new House Districts 48, 49, 57, 64, 65 and 67 either already have black representation or are majority black single-member districts in the 1975 plan. Hence, there is no need for special elections in those districts" (Plaintiffs Br. 67).

At the outset, it should be remembered that defendants contend that the district court erred in ordering any special elections after finding no dilution because of resultant changes in black-white district ratios when comparing the districts of the 1979 plan with the corresponding districts of the 1975 plan.[30] However, here defendants address plaintiffs' and intervenor's request for additional special elections. For the sake of argument only, defendants will assume that plaintiffs have demonstrated dilution of black voting strength; that the district court has an affirmative duty to remedy such dilution by establishing districts which maximized black voting strength; and that the district court has a duty to give effect to its remedy by ordering special elections.

[30] Defendants reiterate that the present members of the Legislature were elected under the 1975 court plan, which the district court determined in their November 12, 1976 opinion to be a constitutionally valid plan. That plan has never been held by any court to be unconstitutional.

The district court properly refused to order special elections in any senate district with a black population majority since all such districts were created out of 1975 districts which had black population majorities (App. Vol. III, 226). For this reason, the district court likewise rejected plaintiffs' and intervenor's request for special elections in new house districts with black population majorities which were created out of 1975 districts which had black population majorities (App. Vol. III, 226-229).

As plaintiffs state, "[t]he District Court found that there were five 'newly created black majority districts, brought into existence where no black majority district previously existed.' Opinion of November 12, 1976 (App. Vol. III, 226)" (Plaintiffs Br. 62-63).

The district court refused to order special elections in two of the new black districts (Districts 52 and 81), since ordering special elections in those districts would require special elections in adjoining districts (App. Vol. III, 226-28). Plaintiffs contend that this justification totally fails to outweigh "the constitutional necessity of special election relief to remedy the unconstitutional dilution of black voting strength present in the prior discriminatory multi-member districts" (Plaintiffs Br. 64). Remarkably, plaintiffs argue that to avoid this problem the district court clearly could have "authorize[d] a slight increase in the House to meet constitutional requirements" (Plaintiffs Br. 64). While plaintiffs make this argument to this Court, they strongly resisted in the district court any such increase in the membership of the House. Plaintiffs contended that the district court's previous holding that it did not have such authority to increase the size

of the legislature was *res judicata.*[31] Also, plaintiffs submitted that:

> Any increase in the number of seats, for example, in the House of Representatives, would diminish black voting strength in that body (App. Vol. III, 200).

Plaintiffs' counsel advised the district court that each increase of black representatives without any change in the size of the membership, equals an increase of 0.819 percent, while each increase of black representatives with a corresponding change in the size of the House membership would represent a change of only 0.813 percent (App. Vol. III, 200). Apparently, plaintiffs were contending that any increase of the legislature by one seat and one black representative would be a dilution of 0.006 percent as compared to leaving the size of the House the same and having one more black representative.

Again, assuming for this discussion only, that dilution existed under the 1975 plan, it was clearly a proper exercise of the district court's equity powers to reject special election requests where it felt that black citizens had an effective vote in majority black districts or in districts with substantial black population. Likewise, it was a proper balance of equities to refuse to order special elections which would have a domino effect of requiring special elections in adjoining districts.

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[31] Plaintiffs submitted, "This holding was left undisturbed on appeal and thus is *res judicata*. We believe the Court at this time lacks the authority to depart from its prior ruling" (App. Vol. III, 200).

In *Lemon* v. *Kurtzman,* 411 U.S. 192 (1973), this Court characterized the nature and extent of a trial court's discretionary power in shaping equity decrees. This Court taught us that:

> In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow. *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 15, 27 n. 10 (1971). Moreover, in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable. 411 U.S. at 200 (footnote omitted).

Continuing, this Court stressed that the practical realities must be considered:

> In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding that those interests have constitutional roots. 411 U.S. at 201.

Mid-term elections would unnecessarily disrupt the operation of an entire branch of Mississippi government. Special elections would require several of its members to again seek reelection, making it necessary to extend the next legislative session to allow for adjustments in committee assignments if new legislators were in fact elected. Special elections would necessarily require the expenditure of substantial county funds to compensate the election officials in each precinct involved and for other expenses incidental to holding elections. Further, the implementation of any plan based entirely on single-member districts would necessitate several time consuming administrative tasks (e.g. compiling new voting tests for the entire State,

formulating new election district lines, familiarizing the electorate with the new election districts, and the probability of reregistration of voters in many of the newly created legislative districts). *Sims* v. *Amos*, 336 F. Supp. 924 (M.D. Ala. 1972), *aff'd* 409 U.S. 942 (1972).

Plaintiffs and intervenor cite several cases in support of their request for special elections (Plaintiffs Br. 69; Intervenor Br. 96). These cases are inapplicable to the issue involved here. At most, some of these cases stand only for the proposition that federal courts have the power to order special elections under the most extraordinary circumstances. Defendants do not argue with this proposition but submit that the district court in the case *sub judice* did not abuse its discretion in refusing to order special elections as requested by the plaintiffs and intervenor.[32]

[32] In its request for special elections intervenor calls upon this Court to take into consideration its assertion that "the State has repeatedly failed to offer an acceptable plan which would have made a court-ordered plan, and special elections unnecessary" (Intervenor Br. 96). This misstatement completely overlooks the diligent and repeated efforts of the Mississippi Legislature to resolve this controversy. *See* Defendants Br. 10, 24, 25. It is intervenor's adamant refusal to scrutinize the 1975 Mississippi legislative plan under the *Beer* v. *United States*, 425 U.S. 130, rationale, in the manner and method dictated by this Court in *Georgia* v. *United States*, 411 U.S. 526, 540 (1973), that has made a court-ordered plan necessary. Intervenor's refusal to follow the clear dictates of this Court in regard to its Section 5 duties and responsibilities is generated by its blind desire to impose upon the State of Mississippi its own political philosophy (i.e. that multi-member districts are unconstitutional per se, and that legislative districts must be gerrymandered in order to maximize black voting strength and to create safe black districts).

IV. ATTORNEY FEES

Plaintiffs cannot realistically be said to be the prevailing parties in this litigation and, thus are not entitled to an award of attorneys' fees pursuant to the statutory provisions[33] and decisions of this Court[34] relied upon by them.

The decisions of this Court and the statutes enacted by Congress upon which plaintiffs rely as bases for the awarding of attorneys' fees are inapplicable to this case. *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968); *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711 (1974); and, *Wallace* v. *House*, 425 U.S. 947 (1976), are not pertinent to the question of whether the attorneys' fees can be awarded against funds of the State. The question of the circumstances under which a monetary judgment can be awarded against State funds is controlled by *Edelman* v. *Jordan*, 415 U.S. 651 (1974), and *Fitzpatrick* v. *Bitzer*, —— U.S. ——, 96 S.Ct. 2666 (1976).

In *Bitzer, supra*, this Court held that the immunity of the state to a monetary judgment could be abrogated by "express congressional authority" to sue a state or a state government. —— U.S. at ——, 96 S.Ct. 2672. The statutes relied upon by plaintiffs to justify the award of attorneys' fees against State funds, Section 402 of the 1975 amendments to the Voting Rights Act of 1965, 89 Stat. 404, 42 U.S.C.

[33] Section 402 of the 1975 amendments to the Voting Rights Act of 1965, 89 Stat. 404, 42 U.S.C. § 1973*l*(e); the Civil Rights Attorney's Fees Awards Act of 1976, P.L. 94-559, 90 Stat. 2461.

[34] *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968); *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711 (1974); and *Wallace* v. *House*, 425 U.S. 94 (1976).

§ 1973*l*(e) and the Civil Rights Attorneys' Fees Award Act of 1976, P.L. 94-559, 90 Stat. 2641, do not meet the standards and criteria stated in *Bitzer*.

This Court held in *Bitzer, supra,* that Congress has the constitutional authority, pursuant to the power vested in it by § 5 of the Fourteenth Amendment to enforce the provisions of the amendment by appropriate legislation, to provide that persons might bring suit in the Federal Courts against states or state agencies, and to receive awards for back pay and attorneys' fees in appropriate cases. The statute under consideration in *Bitzer* was Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* As amended by Congress in 1972, this statute provides in clear, explicit and unambiguous language that the United States District Courts shall have jurisdiction of suits brought against states alleging a violation of rights granted and secured by said Title VII. *See, Bitzer,* —— U.S at ——, fn. 2, 96 S.Ct. at 2668, fn. 2.

Thus, it is clear that Title VII of the Civil Rights Act of 1964, *as amended,* is a jurisdictional statute which provides that states and state agencies may be sued for damages in Federal Courts on account of discrimination in employment, and the Federal Courts are thereby vested with jurisdiction to award such money judgment for damages and attorneys' fees. *See* 42 U.S.C. §§ 2000e-5 (g) and (k).

Unlike the relevant provisions of Title VII of the Civil Rights Act of 1964, the 1975 Amendments to the Voting Rights Act and the Civil Rights Attorney's Fee Award Act of 1976 do not provide for the abrogation of the state's immunity to suit or judgment. In short, these acts fail the "*Bitzer* test." These acts obviously do not contain the "express congressional authority" which the *Bitzer* court held to be a necessary prerequisite to monetary recovery against a state.

Of critical importance here is that the Acts do not amend the definition of "person" found in 42 U.S.C. § 1983 to cover states. It is well settled that states or state agencies are not "persons" under § 1983, *Monroe* v. *Pape,* 365 U.S. 167 (1961), *City of Kenosha* v. *Bruno,* 412 U.S. 507 (1973), and therefore, are not subject to suit and an award of attorney fees pursuant to that statute. Nor do the Acts by their own terms make states, state governments, or state agencies amenable to suit or judgment. If the Acts were interpreted to make the State of Mississippi subject to monetary judgment, serious Eleventh Amendment issues would be raised, because the strictures of that Amendment bar any suit "commenced *or prosecuted* against one of the United States." U.S. Const. Amend. XI (Emphasis supplied).

The award of attorneys' fees is barred by the Eleventh Amendment to the Constitution, relevant decisions of this Court interpreting that Amendment, and the failure to join an indispensable party defendant, the State of Mississippi.

The complaint in this case was filed against certain officials of the State of Mississippi in their respective official capacities (App. Vol. I, 37-39) At various stages in this and related litigation, numerous persons were substituted as parties defendant in their official capacities pursuant to Rule 25(d) of the Federal Rules of Civil Procedure (App. Vol. I, 17, docket entry of 4-17-73).

This Court has held that an effort to obtain a judgment against State officials sued in their official capacities constituted a suit against a State, and is barred by the Eleventh Amendment. *Ex Parte Ayers,* 123 U.S. 433, 487-492 (1887); *Great Northern Ins. Co.* v. *Read,* 322 U.S. 47, 50-53 (1944); *Ford Co.* v. *Dept. of Treasury,* 323 U.S. 459, 462-464 (1945); *Kennecott Copper Corp.* v. *Tax Comm.* 327 U.S. 573, 576-577 (1946).

Having established that any award of attorneys' fees will be paid from funds of the State of Mississippi, we address the question of the effect of the failure to join the State of Mississippi as a party to this action. This Court has made it clear that courts will not adjudicate the rights, duties, liabilities, and obligations of a state when the state is not a party to the proceedings. *Durfee* v. *Duke,* 375 U.S. 106, 115 (1963); *Arkansas* v. *Tennessee,* 246 U.S. 158, 176 (1918); and *Western Union Co.* v. *Pennsylvania,* 368 U.S. 71, 75 (1961).

As a corolary to this principle, this Court has held that the State is an indispensable party to an action seeking to recover money from a state treasury. *Christian* v. *Atlantic and North Carolina Railroad Co.,* 133 U.S. 233, 241, 243-244 (1890); *Belknap* v. *Schild,* 161 U.S. 11, 18 (1896).

This Court has interpreted new Rule 19 of the Federal Rules of Civil Procedure dealing with parties, and synthesized the provisions of Rule 19 with the line of decisions relating to necessary and indispensable parties. *Provident Bank* v. *Patterson,* 390 U.S. 102 (1968). In *Provident Bank and Trust Co.,* this Court made it plain that the line of cases beginning with *Shields* v. *Barrow,* 17 How. 130 dealing with necessary

and indispensable parties is still the law, and that Rule 19 is to be used as a guide in interpreting the principles enunciated by *Shields* and its progeny in specific cases.

The jurisdiction to determine who are necessary or indispensable parties in classes of litigation is vested solely within the Judicial Branch of government of the United States. Any effort by Congress to determine by legislation who shall be necessary or indispensable parties to litigation would run afoul of the principle of separation of powers. Recently, this Court reemphasized that the judicial power of the United States cannot be shared with the Executive Branch. *United States* v. *Nixon,* 418 U.S. 683, 701 (1974). By the same token, the judicial power of the United States cannot be shared with the Legislative Branch, as this Court has held in *United States* v. *Romana,* 382 U.S. 136 (1965).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the case remanded with instructions to adopt the 1975 court plan as the permanent plan, or in the alternative to formulate a reapportionment plan which preserves the integrity of county boundaries. Moreover, plaintiffs' request for attorney fees should be denied.

Respectfully submitted,

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